

## 9-5.000

# ISSUES RELATED TO TRIALS AND OTHER COURT PROCEEDINGS

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- 9-5.100 Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ("Giglio Policy")**
- 9-5.110 Testimony of FBI Laboratory Examiners**
- 9-5.150 Authorization to Close Judicial Proceedings to Members of the Press and Public**
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### 9-5.100

#### **Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ("Giglio Policy")**

On December 9, 1996, the Attorney General issued a Policy regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ("Giglio Policy"). It applies to all Department of Justice Investigative agencies that are named in the Preface, below.

The Secretary of the Treasury has issued the same policy for all Treasury investigative agencies.

#### **Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ("Giglio Policy")**

**Preface:** The following policy is established for: the Federal Bureau of Investigation, Drug Enforcement Administration, Immigration and Naturalization Service, the United States Marshals Service, the Department of Justice Office of the Inspector General, and the Department of Justice Office of Professional Responsibility ("the investigative agencies"). It addresses their disclosure of potential impeachment information to the United States Attorneys' Offices and Department of Justice litigating sections with authority to prosecute criminal cases ("Department of Justice prosecuting offices"). The purpose of this policy is to ensure that prosecutors receive sufficient information to meet their obligations under *Giglio v. United States*, 405 U.S. 150 (1972), while protecting the legitimate privacy rights of Government employees. NOTE: This policy is not intended to create or confer any rights, privileges, or benefits to prospective or actual witnesses or defendants. It is also not intended to have the force of law. *United States v. Caceres*, 440 U.S. 741 (1979).

The exact parameters of potential impeachment information are not easily determined. Potential impeachment information, however, has been generally defined as impeaching information which is material to the defense. This information may include but is not strictly limited to: (a) specific instances of conduct of a witness for the purpose of attacking the witness' credibility or character for truthfulness; (b) evidence in the form of opinion or reputation as to a witness' character for truthfulness; (c) prior inconsistent statements; and (d) information that may be used to suggest that a witness is biased.

This policy is not intended to replace the obligation of individual agency employees to inform prosecuting attorneys with whom they work of potential impeachment information prior to providing a sworn statement or testimony in any investigation or case. In the majority of investigations and cases in which agency employees may be affiants or witnesses, it is expected that the prosecuting attorney will be able to obtain all potential impeachment information directly from agency witnesses during the normal course of investigations and/or preparation for hearings or trials.

### **Procedures for Disclosing Potential Impeachment Information Relating to Department of Justice Employees**

1. **Obligation to Disclose Potential Impeachment Information.** It is expected that a prosecutor generally will be able to obtain all potential impeachment information directly from potential agency witnesses and/or affiants. Each investigative agency employee is obligated to inform prosecutors with whom they work of potential impeachment information as early as possible prior to providing a sworn statement or testimony in any criminal investigation or case. Each investigative agency should ensure that its employees fulfill this obligation. Nevertheless, in some cases, a prosecutor may also decide to request potential impeachment information from the investigative agency. This policy sets forth procedures for those cases in which a prosecutor decides to make such a request.
2. **Agency Officials.** Each of the investigative agencies shall designate an appropriate official(s) to serve as the point(s) of contact concerning Department of Justice employees' potential impeachment information ("the Agency Official"). Each Agency Official shall consult periodically with the relevant Requesting Officials about Supreme Court caselaw, circuit caselaw, and district court rulings and practice governing the definition and disclosure of impeachment information.
3. **Requesting Officials.** Each of the Department of Justice prosecuting offices shall designate an appropriate senior official(s) to serve as the point(s) of contact concerning potential impeachment information ("the Requesting Official"). Each Requesting Official shall inform the relevant Agency Officials about Supreme Court caselaw, circuit caselaw, and district court rulings and practice governing the definition and disclosure of impeachment information.
4. **Request to Agency Officials.** When a prosecutor determines that it is necessary to request potential impeachment information from an Agency Official(s) relating to an agency employee identified as a potential witness or affiant ("the employee") in a specific criminal case or investigation, the prosecutor shall notify the appropriate Requesting Official. Upon receiving such notification, the Requesting Official may request potential impeachment information relating to the employee from the employing Agency Official(s) and the designated Agency Official(s) in the Department of Justice Office of the Inspector General ("OIG") and the Department of Justice Office of Professional Responsibility ("DOJ-OPR").
5. **Agency Review and Disclosure.** Upon receiving the request described in Paragraph 4, the Agency Official(s) from the employing agency, the OIG and DOJ-OPR shall each conduct a review, in accordance with its respective agency plan, for potential impeachment information regarding the identified employee. The employing Agency Official(s), the OIG and DOJ-OPR shall advise the Requesting Official of: (a) any finding of misconduct that reflects upon the truthfulness or possible bias of the employee, including a finding of lack of candor during an administrative inquiry; (b) any past or pending criminal charge brought against the employee; and (c) any credible allegation of misconduct that reflects upon the truthfulness or possible bias of the employee that is the subject of a pending investigation.
6. **Treatment of Allegations Which Are Unsubstantiated, Not Credible, or Have Resulted in Exoneration.** Allegations that cannot be substantiated, are not credible, or have resulted in the exoneration of an employee generally are not considered to be potential impeachment information. Upon request, such information which reflects upon the truthfulness or bias of the employee, to the extent maintained by the

agency, will be provided to the prosecuting office under the following circumstances: (a) when the Requesting Official advises the Agency Official that it is required by a Court decision in the district where the investigation or case is being pursued; (b) when, on or after the effective date of this policy: (i) the allegation was made by a federal prosecutor, magistrate judge, or judge; or (ii) the allegation received publicity; (c) when the Requesting Official and the Agency Official agree that such disclosure is appropriate, based upon exceptional circumstances involving the nature of the case or the role of the agency witness; or (d) when disclosure is otherwise deemed appropriate by the agency. The agency is responsible for advising the prosecuting office, to the extent determined, whether any aforementioned allegation is unsubstantiated, not credible, or resulted in the employee's exoneration.

NOTE: With regard to allegations disclosed to a prosecuting office under this paragraph, the head of the prosecuting office shall ensure that special care is taken to protect the confidentiality of such information and the privacy interests and reputations of agency employee-witnesses, in accordance with paragraph 13 below. At the conclusion of the case, if such information was not disclosed to the defense, the head of the prosecuting office shall ensure that all materials received from an investigative agency regarding the allegation, including any and all copies, are expeditiously returned to the investigative agency. This does not prohibit a prosecuting office from keeping motions, responses, legal memoranda, court orders, and internal office memoranda or correspondence, in the relevant criminal case file(s).

7. **Prosecuting Office Records.** Department of Justice prosecuting offices shall not retain in any system of records that can be accessed by the identity of an employee, potential impeachment information that was provided by an agency, except where the information was disclosed to defense counsel. This policy does not prohibit Department of Justice prosecuting offices from keeping motions and Court orders and supporting documents in the relevant criminal case file.
8. **Copies to Agencies.** When potential impeachment information received from Agency Officials has been disclosed to a Court or defense counsel, the information disclosed, along with any judicial rulings and related pleadings, shall be provided to the Agency Official that provided the information and to the employing Agency Official for retention in the employing agency's system of records. The agency shall maintain judicial rulings and related pleadings on information that was disclosed to the Court but not to the defense in a manner that allows expeditious access upon the request of the Requesting Official.
9. **Record Retention.** When potential impeachment information received from Agency Officials has been disclosed to defense counsel, the information disclosed, along with any judicial rulings and related pleadings, may be retained by the Requesting Official, together with any related correspondence or memoranda, in a system of records that can be accessed by the identity of the employee.
10. **Updating Records.** Before any federal prosecutor uses or relies upon information included in the prosecuting office's system of records, the Requesting Official shall contact the relevant Agency Official(s) to determine the status of the potential impeachment information and shall add any additional information provided to the prosecuting office's system of records.
11. **Continuing Duty to Disclose.** Each agency plan shall include provisions which will assure that, once a request for potential impeachment information has been made, the prosecuting office will be made aware of any additional potential impeachment information that arises after such request and during the pendency of the specific criminal case or investigation in which the employee is a potential witness or affiant. A prosecuting office which has made a request for potential impeachment information shall promptly notify the relevant agency when the specific criminal case or investigation for which the request was made ends in a judgment or declination, at which time the agency's duty to disclose shall cease.
12. **Removal of Records Upon Transfer, Reassignment, or Retirement of Employee.** Upon being notified that an employee has retired, been transferred to an office in another judicial district, or been reassigned to

a position in which the employee will neither be an affiant nor witness, and subsequent to the resolution of any litigation pending in the prosecuting office in which the employee could be an affiant or witness, the Requesting Official shall remove from the prosecuting office's system of records any record that can be accessed by the identity of the employee.

- 13. Prosecuting Office Plans to Implement Policy.** Within 120 days of the effective date of this policy, each prosecuting office shall develop a plan to implement this policy. The plan shall include provisions that require: (a) communication by the prosecuting office with the agency about the disclosure of potential impeachment information to the Court or defense counsel, including allowing the agency to express its views on whether certain information should be disclosed to the Court or defense counsel; (b) preserving the security and confidentiality of potential impeachment information through proper storage and restricted access within a prosecuting office; (c) when appropriate, seeking an *ex parte*, *in camera* review and decision by the Court regarding whether potential impeachment information must be disclosed to defense counsel; (d) when appropriate, seeking protective orders to limit the use and further dissemination of potential impeachment information by defense counsel; and, (e) allowing the relevant agencies the timely opportunity to fully express their views.
- 14. Investigative Agency Plans to Implement Policy.** Within 120 days of the effective date of this policy, each of the investigative agencies shall develop a plan to effectuate this policy.

### **9-5.110 Testimony of FBI Laboratory Examiners**

In situations where FBI laboratory examinations have resulted in findings having no apparent probative value, yet defense counsel intends to subpoena the examiner to testify the United States Attorney should inform defense counsel of the FBI's policy requiring payment of the examiner's travel expenses by defense counsel. The United States Attorney should also attempt to secure a stipulation concerning this testimony. This will avoid needless expenditures of time and money attendant to the appearance of the examiner in court.

### **9-5.150 Authorization to Close Judicial Proceedings to Members of the Press and Public**

Procedures and standards regarding the closure of judicial proceedings to members of the press and public are set forth in 28 C.F.R. § 50.9. No motion for such a closure or consent to the closure of criminal proceedings may be sought or agreed to by a Department employee without the express authorization of the Deputy Attorney General.

All attorneys seeking authority to move for or consent to the closure of a matter should be aware of the requirements of 28 C.F.R. § 50.9. There is a strong presumption against closing proceedings, and the Department foresees very few cases in which closure would be warranted. Only when a closed proceeding is plainly essential to the interests of justice should a government attorney seek authorization from the Deputy Attorney General to move for or consent to closure of a judicial proceeding.

Whenever authorization to close a judicial proceeding is being sought pursuant to 28 C.F.R. § 50.9 in a case or matter under the supervision of the Criminal Division, the Policy and Statutory Enforcement Unit, Office of Enforcement Operations should be contacted. In cases or matters under the supervision of other divisions of the Department of Justice, the appropriate division should be contacted.